(UFC)

United States Government
Before The National Labor Relations Board

Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center	)	
and	)	**Cases 18-RC-16415** **18-RC-16416**
United Steelworkers of America, AFL-CIO/CLC	)	

Union's Brief Upon Review

Now Comes, the United Steelworkers of America, AFL-CIO/CLC ("Union" or "USWA") and does hereby urge the Board, upon review, to adopt the Supplemental Decision of Region 18 in which it reaffirmed its decision to certify the unit of LPNs and RNs in this case as this decision is consistent with *Kentucky River* and with the Board's post-*Kentucky River* cases.

I. Introduction

By decision dated October 2, 2001, the U.S. Court of Appeals for the Eighth Circuit remanded the instant case to the Board. *Beverly Enterprises v. NLRB*, 266 F.3d 786 (8th Cir. 2001). In particular, the Eighth Circuit remanded this case "to afford the Board the opportunity to reconsider its decision" to include the employer's RNS and LPNs in the bargaining unit in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc.* (*"Kentucky River"*), 532 U.S. 706 (2001). *Id.* at 789. On April 24, 2002, the Board, in turn, remanded this case back to NLRB, Region 18 "for further consideration . . . on the issues of whether the Employer-Respondent's registered nurses and licensed practical nurses 'assign' and 'responsibly direct' other employees and on the scope or degree of 'independent judgment' used in the exercise of such authority."

While NLRB, Region 18 invited the parties to submit positions on whether the record in this case should be re-open, both parties agreed to re-submit the case to the Region upon the pre-existing record (Sup. Dec. at p. 2). Based upon this original record, NLRB, Region 18 issued a Supplemental Decision in this case on August 20, 2002. In this Supplemental Decision, the Region framed the issue before it upon remand as follows: "[t]he sole issue raised by the Board's remand, and the only issue addressed by the parties in their position statements, is whether RNs and LPNs acting as charge nurse exercise independent judgment to assign and responsibly direct other employees." (Sup. Dec. at p. 3). For it part, the Employer urged the Region to answer this question in the affirmative based upon its allegations that charge nurses give directions to CNAs (1) to change their patient, room and even floor assignments; (2) to perform particular patient care tasks; (3) to leave early or stay late in contravention of posted schedules; (4) to work overtime; (5) to work a shift for which they are not scheduled; and (6) based on the claim that charge nurses are authorized to sign off on time clock revisions (*Id.* at p. 4).

The Region, rejecting the Employer's arguments in this regard, concluded that the inclusion of the RNS and LPNs in the bargaining unit is in complete accord with the *Kentucky River* decision. To wit, the Region concluded that while these employees, when acting as charge nurses, have some authority to direct the tasks, assignments and schedules of the CNAs, "the judgments of the charge nurses are so circumscribed by existing policies, orders and regulations of the Employer that they do not exercise independent judgment within the meaning of Section 2(11)." (Sup. Dec. at p. 4). As we demonstrate below, this decision is supported by the record and is in keeping with *Kentucky River,* in which the Supreme Court affirmed the Board's authority to find that "the degree of judgment that might ordinarily be required to conduct a

particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." 532 U.S. at 713-714.

In addition, the Region's Supplemental Decision is in keeping with the Supreme Court's admonition -- an admonition which the Board must keep in mind in reviewing this case -- "to take care to assure that exemptions from coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." Holly Farms Corp. v. NLRB, 517 U.S. 392, 399 (1996). And, as the Board has expressed in its acute care hospital bargaining unit rules, absent extraordinary circumstances, a unit of all nurses, including Rns, is an appropriate unit for bargaining. 29 C.F.R. § 103.30(a)(1). In other words, nurses should, as a general rule, be accorded the protection of the Act.

II. Statement of Facts

The Beverly Administration Is In Charge Of The Nursing Home Around The Clock

Beverly operates a nursing home in upstate Minnesota. This nursing home has a total of 80 beds: 34 on the first floor and 46 on the second (Tr. 20-21).

The parties stipulate that the nursing department of the Beverly nursing home is directed by a number of statutory supervisors (Tr. 13). The chief supervisor is Susan Kepler, the Director of Nursing Services ("DON"), who in turn reports to the Executive Director of the nursing home, Sheri High (Tr. 13,15). Next in line is the Assistant Director of Nursing Services ("ADON"), Jacie Marchetti (Tr. 13). Finally, there are three (3) Resident Care Managers -- Patrice Rusczak, Vivian Murray and Colleen Pucely (Tr. 13, 17). These stipulated supervisors participate on a weekly basis in what Ms. Kepler refers to as "management meetings" which no other nurses (whether RNs or LPNs) attend (Tr. 169-170).

In addition to the above on-site supervisors, there is a Human Resources Representative in Minneapolis who makes final calls on personnel decisions, such as whether a nurse will be kept on after the probationary period (Tr. 80-81, 49).

The above supervisors direct the work of eight (8) Registered Nurses ("RNs"), twelve (12) Licensed Practical Nurses ("LPNs") and thirty-six (36) Certified Nursing Assistants ("CNAs") (Tr. 17,19-20). The question in this case is whether the RNs and eleven of the twelve LPNs, when (if at all) serving as charge nurses, also "supervise" the CNAs within the meaning of the Act.

According to their job description, the Resident Care Managers, who are paid a differential of $.50 over the RNs (Tr. 196), "exercise[] supervisory responsibilities over non-supervisory team members" consisting of the RNs, LPNs and CNAs as described above (Emp. Ex. 8 at p. 2). While the Resident Care Managers (a.k.a. Resident Care Coordinators) are not always present at the nursing home, they are in fact responsible "for the 24 hours coordination of the delivery of services and quality assurance of appropriate and time care interventions of appropriate and timely care interventions for all residents assigned to the unit." (Tr. 45-46; Em. Ex. 8 at p. 4) (emphasis added).

When there are no statutory supervisors present at the nursing home, the charge nurses (whether RN or LPN) are responsible for overseeing resident care (Tr .231, 326-327). However, it is undisputed that DON Kepler and ADON Marcetti are always available by cell phone (even on evenings and weekends) for charge nurses to consult with on various issues, such as resident care and how to deal with staffing problems (Tr .25, 182-183, 194, 235-236, 312-313).

Written Procedures & Protocols Govern Assignments & Scheduling

In carrying out their duties of overseeing resident care, the charge nurses must follow "the resident care plan" which the Resident Care Managers have written up (Tr. 18). In addition, the Charge Nurses must follow the written protocalls/ procedures governing resident care which are developed by the corporate headquarters in Minneapolis (Tr. 200). They must also follow the labor agreement covering the terms and conditions of CNAs (Tr. 70, Emp.Ex. 32).

The CNAs themselves must also follow the resident care plan and protocalls/procedures in performing their duties (Tr. 18). As DON Susan Kepler explains, the CNAs "have their job, they know what the job is, they are to do it." (Tr. 177). As a result, they do not need close supervision (Tr. 177). Moreover, CNAs are not trained by charge nurses; they are trained by other CNAs (Tr. 279). And, if there is a problem with a new CNA, it is usually a more senior CNA who reports the problem to the administration (Tr. 293).

What shift, section and rooms a CNA is assigned is determined at the outset of the CNA's employment by the job posting pursuant to which he/she was hired (Tr. 26-27). Such assignment does <u>not</u> change on a daily basis (Tr. 27). And, it is the nursing administrative assistant, with the final approval of the ADON, who prepares the schedules of the CNAs as well as of the RNs and LPNs (Tr. 197-198). The Resident Care Managers, on the other hand, come up with their own schedules (Tr. 197).

While the charge nurses may make adjustments in CNA assignments, they can do so only to address imbalances or shortages in staff (Tr. 28,410-12), and even then their ability to do so is strictly proscribed. For example, if a charge nurse must find a replacement for a CNA during the evening or weekend hours or must ask a CNA to work overtime to address an understaffing

problem, the charge nurse must ask CNAs in order of seniority as required by the labor agreement (Tr. 70,166-167). Moreover, the charge nurse has no ability to order off duty CNAs to come to work to fill in as replacements; the charge nurse can only ask for volunteers (Tr. 207, 219). Any CNA asked to come in to fill in as a replacement is free to decline such request (Tr. 490). Furthermore, if the need for such a replacement comes up during the week day, it is in fact the nursing administrative assistant who calls for the replacement (Id.). In practice, CNAs many times find their own replacements (Tr. 315-316).

In addition, when there is a problem with overstaffing, charge nurses are informed of such a situation by a posting drawn up by the administration (Tr. 232). This posting will state what the staffing situation is, that staffing hours need to be reduced and will either designate who in particular is to be sent home or will tell the charge nurse to ask for volunteers (Id.). And, in the event the charge nurse must ask for volunteers, he/she must make such a request of CNAs in seniority order as dictated by the labor agreement (Tr. 168-169).

Finally, charge nurses are expressly prohibited from authorizing a CNA to go home early because the CNA desires to do so, e.g., because he/she is sick (Tr. 225,314). As DON Kepler explains, if charge nurses wish to do so in a particular instance, "[t]hey have [to] come to me." (Tr. 181,314). Similarly, when CNAs want a change in their work schedule or wish to take vacation or time off from work, they must ask either DON Kepler or ADON Jacie Marcetti (Tr. 226, 257-259,329-330).

When particular Charge Nurses have stepped outside the bounds set by the administration in regard to altering CNA assignments, they have been told to stop. For example, one LPN testified that she was reprimanded for sending a CNA home early because she had alcohol on her

breath (Tr. 494-495). DON Kepler also explained that when another charge LPN was changing work schedules "real consistently . . . we had to talk to that LPN because it just didn't seem that the work load was necessary." (Tr. 411). Ms. Kepler testified that she wants charge nurses to make changes in CNA work routines in order to address staffing needs "[a]s long as it's well thought-out, absolutely. I just wouldn't want to see this changed on a daily basis . . . ." (Tr. 122).

Argument

I. The Supreme Court's Allocation of The Burden Burden of Proof Supports The Region's Decision

The Supreme Court dealt with two limited issues in *Kentucky River*. First, the Supreme Court treated with the question of which party has the burden of proving supervisory status in a case, such as the instant one, in which an employer attempts to exclude employees from a bargaining unit on the basis that they are supervisors. *Kentucky River*, 532 U.S. at 710-712. The Supreme Court answered this question by holding, just as the Board has for many years and as the Region did in this case, that *the employer bears this burden.* Id. at 711-712. This is important, for the record in this case is scant, and at times utterly silent, on a number of issues crucial to deciding the supervisory status issue. And, to the extent that the record is so, Beverly case cannot succeed. As the Board has held, "[w]henever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least not on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *accord, Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999) ("any lack of evidence in the record is construed against the party asserting supervisory status.").

For example, while the issue in this case is "whether the Employer's RNs and LPNs *acting as charge nurses* were supervisors within the meaning of the Act" (Supp. Dec. at ps. 1-2), the record is silent as to how many of the 11 LPNs at issue in this case ever serve as charge nurses or how often. In addition, the record is silent as to which particular, individual LPNs serve in such a capacity. Indeed, the Region emphasized this fact in its original, March 9, 1999 Decision in this case (Decision at p. 5, fn. 4).

This is important, for it is well-settled that only individual employees can be excluded from the protections of the Act and only if it is proven that the particular, individual employee fits into the Act's definition of supervisor. Thus, as the Board concluded in *Bakersfield Californian*, 316 NLRB 1211, 1218 n. 17 (1995), an employer cannot sustain its burden of demonstrating supervisory authority through "conclusory assertions" about general categories of employees. As the Board explained in *Bakersfield*, such conclusory "assertions do not establish that *these individuals* possess any Sec. 2(11) authority" where the employer fails to "give any examples with respect to recommendations made *by these individuals*." *Id.* (emphasis added). Similarly, in this case, Beverly utterly failed to provide evidence as to which individual LPNs serve in the capacity as "charge nurses" or how often they serve in such a capacity. Such a failure is fatal to Beverly's case at least as to the 11 LPNs. *See also, Staco, Inc.*, 244 NLRB 461, 462 (1979) (employer failed to sustain evidence that leadman Jones was a supervisor where it introduced only evidence about leadmen in other departments and where "there is a total lack of evidence in the record before us to show that Jones herself exercised or possessed any of the indicia of supervisory authority set out in Section 2(11) of the Act.").

Similarly, while Beverly largely rests its case for excluding the 8 RNs upon "the role of the RN as the top person in the buildings on evenings and weekends" (Request for Review at p. 11), Beverly has utterly failed to establish how many of the 8 RNs at issue in this case have ever served as the highest-ranking employee on a shift. Similarly, Beverly has never attempted to identify *which particular nurses* serve in such a capacity. Again, the Region emphasized the silence of the record in this regard in its original, March 9, 1999 Decision at p. 17, stating that "[t]he record is silent as to how often any particular charge nurse serves as 'person in charge.'" This represents a critical hole in Beverly's case.

In addition, as the Region emphasized in its Supplemental decision, the record also fails to demonstrate that nurses acting as the highest-ranking employee on a shift, whoever they may be, exercise any more authority over employees than usual. (Sup. Dec. at p. 6). Thus, while the Employer tries to claim in its Request for Review at p. 11 that the Region somehow "failed to recognize that the role of the RN as the top person in the building on evening and weekends . . . establishes supervisory status," the Region in fact concluded, based upon the record, that the Employer failed to shoulder its burden on this score. As the Region explained, "[t]here is no evidence that the night and weekend charge RNS have any different duties or responsibilities than they have at other times." (Sup. Dec. at p. 6).

To the contrary, as the Region explained, the evidence that there is on this subject demonstrates that the charge nurses in fact rely heavily upon statutory supervisors, which remain on call during the evenings and weekends, in order to make decisions as to how to direct CNAs (Tr. 25, 182-183, 235-236, 312-313). As the Region concluded, "the evidence shows that the charge nurses do in fact routinely call the DON or ADON, or even the facility administrator,

regarding issues such as staff shortages that the collectively-bargained 'mandate' procedure did not satisfy." (Sup. Dec., p. 6). As a result, the Region found "the record insufficient to establish that charge nurses exercise any greater independence nights or on weekends than they do weekdays." *Id., citing, Beverly Enterprises-Minnesota v. NLRB*, 148 F.3d 1042, 1048 (8th Cir. 1998) (the fact that charges nurses are highest ranking employee on evening and night shifts does not establish supervisory authority where stipulated supervisors are on call to consult with throughout these shifts); *accord, Ken-Crest Services*, 335 NLRB No. 63, slip op. at 3 fn. 16 (August 27, 2001) (citing *Beverly Enterprises-Minnesota, supra.*, with approval and holding that "nothing in the statutory definition of 'supervisor' implies that service as the highest ranking employee on site requires finding that such an employee must be a statutory supervisor."); *Evergreen New Hope Health & Rehabilitation Center*, Case 32-RC-4872-2, slip op. at 15 (August 10, 2001) (attached hereto as Exhibit A)(Region concluding on remand in post-*Kentucky River* decision that the fact that nurses were highest-ranking employee on-site during night shift was not "dispositive in light of the DON being on-call 24 hours a day for responding to nurses' calls regarding a wide range of patient care and personnel concerns."), *request for review denied* (Sept. 21, 2001). It is the Employer which simply chooses to ignore this evidence as well as the prevailing law on this subject.

As we demonstrate further below, the remainder of the Beverly's case suffers from the same defects in that it is based upon conclusory statements and anecdotal evidence which cannot, as a matter of law, serve to sustain its burden of proof in this case.

II. The Supreme Court Explicitly Endorsed The Analysis of "Independent Judgment" Relied Upon By The Region In This Case

The second issue which the Supreme Court decided in *Kentucky River* concerned the Board's determination of whether certain nurses exercised "independent judgment" in performing 1 of the 12 supervisory functions enumerated by Section 2(11) the Act -- i.e., the function of directing other employees' work. 532 U.S. at 713. Specifically, as the Supreme Court explained, it was called upon to analyze a Board decision in which "[t]he only basis asserted . . . for rejecting respondent's proof of supervisory status with respect to directing patient care was . . . that employees do not use 'independent judgment' when they exercise 'ordinary professional or technical judgment in directing less-skilled employees to deliver services . . .'" (*Id.*) (emphasis added).

While rejecting some of the Board's analysis in *Kentucky River*, the Supreme Court determined that the Board's analysis was proper in the respects applicable to the Region's decision in the instant case. To wit, the Supreme Court held that it is within the Board's authority to determine that an employee does not exercise "independent judgment" in directing other employees' work when that judgment is constrained by "employer-specified standards." 121 S.Ct. at 1867. Thus, the Supreme Court held,

> as reflected in the Board's phrase 'in accordance with employer-specified standards,' it is . . . undoubtedly true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer. So, for example, in *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995), the Board concluded that 'although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations, which require the watch

> officer to contact a superior officer when anything unusual occurs or when problems occur.'

532 U.S. at 713-714 (emphasis added).

The Supreme Court's decision in *Kentucky River* supports the analysis of the Regional Director in this case who correctly found that the discretion of the RNs and LPNs to direct the CNAs is significantly limited by the standards, schedules, regulations and orders set by management (*See*, Transcript ("Tr.") at ps. 26-27, 200, 231-232, 552). *See also*, *Beverly Enterprises - Pennsylvania*, 335 NLRB No. 54, slip op. at ps. 1-2, fn. 3 & ps. 35-37 (August 27, 2001) (Board concluding that "the LPNs exercised only 'routine' authority that did not require the use of independent judgment in directing the work of other employees within the meaning of Section 2(11)."). In addition, as the Regional Director concluded, their discretion is limited by the procedures set forth in the labor agreement between the CNAs and Beverly (Tr. 70; Employer Ex. 32). The limiting force of this labor agreement makes this a uniquely strong case for finding that the RNS and LPNs are not "supervisors" under the Act.

Specifically, the Region in the instant case explained that the ability of the RNS and LPNs to schedule CNAs is greatly circumscribed by the shift schedule which is determined by the collective-bargaining agreement between the CNAs and Beverly (Sup. Dec. at p. 5). As the Regional Director explains, "[w]ho works which shift and where they work as to floor and a specific suite of rooms, are initially set by that schedule, pursuant to a bidding procedure established by the CNAs' collective bargaining agreement." (*Id.*). Moreover, the Regional Director explained, "[i]f someone fails to show up for a scheduled assignment, the charge nurse follows a collectively-bargained procedure for finding a replacement" -- i.e., they must look for a

replacement by seniority (*Id.; see*, CNA labor agreement (Employer Ex. 32) at p. 13). And, contrary to the disingenuous claims of Beverly (Request for Review at ps. 5, 11), this "collectively-bargained procedure for finding a replacement" does not permit the RNS or LPNs to require (or "mandate") off-duty CNAs to come in to work to fill in a staffing shortage. Indeed, Beverly's own witness, DON Kepler, admitted that charge nurses may only request off-duty CNAs to fill a particular shift and that the CNAs are free to decline such requests (Tr. 206-207, 219, 490; *see also*, CNA labor agreement (Employer Ex. 32) at p. 13).

The inability to require off-duty employees to fill in for staffing shortages was one of the key facts the Eighth Circuit relied upon for finding that the charge nurses of the same Employer in this case (but at another Minnesota location) were not "supervisors" under the Act. *See, Beverly Enterprises -- Minnesota, supra.*, 148 F.3d at 1047; *accord, Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 5 (July 19, 2002) ("nurses reliance on volunteers and lack of authority to compel overtime work underlined the absence of supervisory power."). Indeed, the facts here present an even stronger case than *Beverly Enterprises, supra.*, for finding that the RNS and LPNs are not "supervisors" in that the CNA labor agreement requires them to attempt to fill in for staff shortages by seniority. *See also, Beverly Health & Rehabilitation Services*, 335 NLRB No. 54, slip op. at p. 35 fn. 60 (20001) (finding that LPNs were not supervisors in light of the fact, *inter alia*, that the value of their evaluations of the CNAs was "severely circumscribed because CNAs are covered by a contract."); *Evergreen New Hope Health & Rehabilitation Center, supra.*, slip op. at 10-11 (nurses do not exercise independent authority to assign where, *inter alia*, "the responsibility of the nurses to get a CNA to replace an absent employee is performed routinely and strictly in accordance with the Employer's protocal and contractual

seniority procedures."). Such was not true in *Beverly Enterprises*, 148 F.3d at 1047, where the court noted that there were "no established guidelines . . . to aid nurses in determining which off-duty [nursing assistants] to contact, leaving the matter to the nurses' complete discretion."

In the same vein, the Region determined that there is "no evidence that charge nurses exercise independent judgment in releasing employees early from a scheduled shift or getting them to stay over" in that "[t]he number of employees appears to be dictated by the schedule and the census, and the identity of affected employees is determined by volunteers or the collectively-bargained procedure." (Sup. Dec. at p. 5). Moreover, as the Regional Director concluded, it is undisputed that the RNS and CNAs have been told by the Employer that "they are not to 'approve' any requests to leave early, but are to simply allow the employee[s] to go at their own discretion if they feel they have to, and leave it up to [ADON] Marchetti later to decide whether to excuse or punish the absence." (*Id.*; Tr. 225, 314). Again, the Employer in this case attempts to prevail by simply ignoring this undisputed record evidence (Request for Review at p. 5).

In addition, the Regional Director concluded that the record does not support the Employer's claim, which it also makes to the Board (Request for Review at p. 10 & fn. 7), that the RNS and LPNs use independent judgment in changing room and floor assignments (Sup. Dec. at p. 5). As the Regional Director explains,

> [a]lthough Employer witnesses testified conclusionarily that charge nurses make changes in room and floor assignments based on independent judgment of CNAs' skills and abilities, the charge nurses testified as to particular incidents in which they merely asked the CNAs to decide among themselves what each one would do when no-shows or changes in patient census caused imbalances in the work load. *The Employer's conclusionary testimony is insufficient to satisfy its burden of proof.*

(*Id.*). In other words, the Regional Director found that Beverly failed to give any specific evidence of particular, individual nurses allegedly making changes in room and floor assignments or of the process the nurses allegedly engaged in to decide to make such changes.

The Regional Director's conclusion in this regard is supported by the record (Tr. 316, 340-342), as well as the Supreme Court's decision in *Kentucky River* which affirmed the Board's long-standing holding that it is the employer which bears the burden of showing supervisory status in cases such as this one. And, it is well-settled that, just as the Regional Director concluded, this burden is not met by "conclusionary statements made by witnesses, without supporting evidence . . . ." *Sears, Roebuck & Co.*, 304 NLRB 193, 193 (1991); *Quadrex Environmental Co.*, 308 NLRB 101, 101 (1992) ("[a] mere inference of independent judgment without specific support in the record cannot be sustained."); *American Radiator Corp.*, 119 NLRB 1715 (1958) ("[c]onclusory statements such as that these five individuals tell employees in their field of activity 'what to do, and when and how to do it' do not, without supporting evidence, establish supervisory authority."); *Evergreen New Hope Health & Rehabilitation Center, supra.*, slip op. at 11-12 (supervisory authority to assign CNAs to certain tasks, duties or locations not established where, notwithstanding "conclusory statements" by employer witnesses, "[t]he record does establish what factors the nurses consider in making such decisions, what protocals may apply, and what degree of independent judgment they must exercise in making these decision.").

In addition, the Region's conclusion in the above regard is in keeping with the recent decision of the Board in *Franklin Home Health Agency, supra.*, which upheld the Regional Director's conclusion that a nurse's "assignment of tasks in accordance with an Employer's set

practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition." 337 NLRB No. 132, slip op. at 5. The Region's decision is also consistent with the Board's post-*Kentucky River* decision in *Beverly Health & Rehabilitation Services*, 335 NLRB No. 54, slip op. at 33, fn. 51 (2001), where, as here, it was found that the CNAs were left to "decide among themselves" how to handle work assignments.

The Regional Director also concluded, again contrary to the claim of the Employer (Request for Review at p. 5), that "[r]egarding changes in time clock entries, there is no evidence [that] this is anything but rubberstamping corrections requested by the CNAs" and that "CNAs sometimes make their own corrections without needing a charge nurses's approval." (Sup. Dec. at p. 6). The Regional Director's conclusion that this changing of time clock entries is merely routine in nature and therefore does not rise to the level of "supervisory" authority is fully supported by the record (Tr. 76-78) as well as the Supreme Court's decision in *Kentucky River*, 532 U.S. at 713-714 (reaffirming, based on the text of Section 2(11), that the exercise of authority which is "'of merely routine or clerical nature'" does not establish "supervisory" status). *See also, Beverly Enterprises - Pennsylvania*, 335 NLRB No. 54, slip op. at ps. 1-2, fn. 3 & ps. 35-37 (August 27, 2001) (employer failed to meet burden of showing supervisory status of LPNs where "the LPNs exercised only 'routine' authority that did not require the use of independent judgment in directing the work of other employees within the meaning of Section 2(11).").

Furthermore, while Beverly claims that charge nurses "[d]irect the work of CNAs on the first floor, which includes their work related to patient care and personal conduct" (Request for Review at p. 5), the only evidence Beverly points to on this issue concerns only 1 of the 19

nurses at issue in this case, and only shows that this particular nurse has talked to one CNA about "problems handling care assignments" and about the fact that "[s]he's just not doing a good job," and that this nurse "specifies things that weren't done." (Tr. 409-410). Again, this evidence can do nothing to show the supervisory authority of the other 18 nurses. Moreover, even as to this nurse, this evidence does not undermine the Region's determination that her exercise of authority to direct other employees is merely routine.

Applicable here is the post-*Kentucky River* holding of the Board in *Beverly Health & Rehabilitation Services, supra.*:

> 'The essential duty of the CNA is to take care of elderly people who are no longer able to care for themselves. For the most part, such duties require little skill, are repetitive, and at times even unpleasant. . . .
>
> One of the LPNs' responsibilities is to be sure that the CNAs are properly performing their jobs. Thus, LPNs make patient rounds and consult the Aidex. If an LPN sees a patient that needs attending to or a job that has not been properly done, the LPN will call it to the attention of the CNA. This type of direction does not require the independent judgment of Section 2(11).'

335 NLRB No. 54, slip op. at 36 (2001) (supervisory authority not evidenced by the fact that LPNs inform the CNAs "of any particular care requirements" or by the fact that if an LPN "observes them [CNAs] doing something incorrectly, she shows them the correct way to perform the task . . . .") (quoting, *Ten Broeck Commons*, 320 NLRB 806, 807 (1996)); *accord, Evergreen New Hope Health & Rehabilitation Center, supra.*, slip op. at 13-14 ("[j]ust as pointing out mistakes to employees and demonstrating correct procedures to not establish the authority to discipline, neither do they establish, without more, the authority to responsibly direct.").

Finally, the Supreme Court in *Kentucky River* reached a decision which simply does not

apply to the instant case. To wit, the Supreme Court held that the Board may not permissibly reach the conclusion that

> the judgment even of employees who are permitted by their employer to exercise a sufficient *degree* of discretion to assign and direct is not 'independent judgment' if it is a particular *kind* of judgment, namely, 'ordinary professional or technical judgment in directing less-skilled employees to deliver services'

532 U.S. at 714 (Court's emphasis).

In the instant case, this Region properly concluded that the nurses -- by virtue of all the restrictions which Beverly places upon them through procedures, policies, postings and the CNA labor agreement -- do not, in the words of the Supreme Court, "exercise a sufficient *degree* of discretion to assign and direct" to be considered supervisors under the Act. The Region therefore had no occasion to, and therefore did not in fact, make any assessment about the *kind* of judgment the nurses exercised. As a result, the Supreme Court's holding on this point simply has no application here.

Conclusion

In light of the above, the Board, upon review, should adopt the Regional Director's Supplemental Decision as its own.

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Dated: November 14, 2002

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EVERGREEN NEW HOPE HEALTH
& REHABILITATION CENTER
Employer

and Case 32-RC-4872-2

LOCAL 250 HEALTH CARE WORKERS UNION,
SERVICE EMPLOYEES INTERNATIONAL UNION
(SEIU), AFL-CIO, CLC
Petitioner

ORDER

Employer's Request for Review of the Regional Director's Supplemental Decision and Direction of Election is denied as it raises no substantial issues warranting review.

WILMA B. LIEBMAN, MEMBER

JOHN C. TRUESDALE, MEMBER

DENNIS P. WALSH, MEMBER

Dated, Washington, D.C., September 21, 2001.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Tracy, California)

EVERGREEN NEW HOPE HEALTH &
REHABILITATION CENTER

Employer

and

Case 32-RC-4872

LOCAL 250 HEALTH CARE WORKERS
UNION, SERVICE EMPLOYEES
INTERNATIONAL UNION (SEIU), AFL-CIO,
CLC

Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

On May 11, 2001, I issued a Decision and Direction of Election in this matter in which I found, inter alia, that the Employer had not met its burden of establishing that the registered nurses sought to be represented by Petitioner possessed supervisory authority within the meaning of Section 2(11) of the Act. I also found that the record did not contain sufficient information to establish the unit placement of registered nurse Aurora Nervasa and Assistant Medical Data Services Coordinator Debra McFarland and concluded that they should be permitted to vote under challenge. Thereafter, on May 14, 2001, the Employer filed a Request for Review on the grounds that the record established the supervisory authority of the Employer's registered nurses. On June 20 2001, the Board issued its Order remanding the proceeding to reopen the record on the issue of whether the Employer's registered nurses "assign" and "responsibly direct" other

Exhibit 4

employees and the scope of and degree of "independent judgment" used in the exercise of such authority in light of the Supreme Court's May 29, 2001 decision in NLRB v. Kentucky River Community Care, 121 S.Ct. 1861 (2001). The Board also remanded the proceeding and reopened the record for the purpose of determining the unit placement of Nervasa and McFarland. The Employer's request for review was denied in all other respects.[1]

As set forth in my earlier decision, there are presently four full-time RN charge nurses employed at the facility: Paulette Pavlukev, Judy Cabrera, Diane Garrett and Loly Gonzalez. There are also two on-call RN charge nurses: Josefina Solana and Beatriz Villanueva.[2] Additionally, since on or about November 11, 2000, Aurora Nervasa has been employed as a temporary RN charge nurse on the night shift on an on-call basis. The Employer also employs Minerva Soleta as a full-time RN day supervisor who works Monday through Friday, and Remedios Cantos as an on-call weekend RN nurse supervisor. Finally, the Employer employs RN Debra McFarland as an Assistant Medical Data Set Coordinator (AMDSC).

The Charge Nurses

I take official notice of the July 7, 2000 representation hearing record in Evergreen New Hope Health & Rehabilitation Center, Case 32-RC-4776. There, the

[1] In my previous decision, I found that the RNs do not have authority to discipline employees. At best, they make non-effective recommendations that are thoroughly investigated by the DON prior to any disciplinary action. The Board Order specifically set forth the issues for remand and did not include my finding with respect to the RN's authority to discipline. Nevertheless, the Employer presented additional evidence at the remand hearing regarding the authority of the registered nurses to discipline employees. Inasmuch as such evidence is beyond the scope of the remand order, and because there is no indication that such evidence was newly acquired, I have not relied on or fully addressed in this supplemental decision the newly proffered evidence regarding the nurse's purported disciplinary authority.

[2] In my previous decision I excluded Villanueva from the unit because she did not have a sufficient regularity of employment with the Employer.

identical parties submitted evidence on whether the Employer's LVNs should be included in the unit with its CNAs. That record reflects that there are 10 CNAs assigned to the day shift, 7-8 CNAs assigned to the PM shift, and 5 CNAs assigned to the night shift. Management personnel, including DON White and Director of Staff Development (DSD) Sally Armstrong, are present at the facility during the day shift and part of the PM shift, from 8:00 a.m. to 5:00 p.m. After they leave, for a period of 14 to 16 hours starting during the PM shift, the charge nurse is the highest-ranking person at the facility. However, DON White is on-call 24 hours a day. Charge nurses contact her when problems arise, including such matters as outside disturbances, leaky roofs, patient related issues, operational issues, and personnel issues.[3]

When a patient is admitted to the facility, an assessment of his or her condition is performed by the Medical Data Set Coordinator, and a care plan is created which specifies the patient's needs and sets forth the care to be received. All departments participate in formulating the plan. Further care plan assessments are performed on the 5th, 7th, and 14th day of the patient's stay at the facility, or more often if needed. The patient care plan also outlines the directions for all the staff for the daily care of the patient and governs how care is to be provided to the patient. The patient care plan is constantly updated and kept for staff review at the nurses station. All changes to the plan are carefully recorded in the patient chart kept at the nurses station. All employees, including CNAs, are required to be aware of and follow the patient care plan.

[3] The Employer argues on brief that the charge nurses contact DON White solely to give information about what they have done. However, the record does not support such a conclusion. The examples that DON White provided concerning nurses calling to tell her what they had done involved disciplinary incidents, a matter not in issue in this portion of the proceeding.

In addition to the patient care plans, the facility also provides detailed and comprehensive nursing care manuals for RNs and a separate patient care manual for CNAs. The manuals contain protocols for all nursing and patient care procedures. For example, if a nurse wanted assistance on how to clamp off a catheter, the nurse would look up the catheter procedure required by the Employer and simply follow it. Other matters for which policies and procedures are set forth in the 1000+ page nursing care manual include: patient assessments; admission/discharge; diabetic care; dietary needs; eye/ear/nose/throat issues; emergency policy; gastrointestinal, genital and urinary issues; post mortem care; psycho-social issues; rehab nursing; renal dialysis; resident rights; respiratory issues; restraints; physical/chemical issues; safety; skin care; special services; theft and loss; and treatment issues.[4] The manuals are kept at both nursing stations and are used as guides by all employees for following required procedures and practices. Other manuals required to be available at the nurses station cover information control, facility standards, dietary standards, and safety. In addition, wound care, rehabilitation, respiration, and integrated care manuals are also available. If something is not covered in a manual, CNAs ask the charge nurses for assistance. However, often the charge nurses are unavailable and the CNAs go directly to DON White or the DSD for assistance.

The Employer's job description for charge nurses is divided into patient care functions and administrative functions. The job description states that as a patient care function, charge nurses supervise and evaluate all direct care provided within the assigned unit and initiates corrective action as necessary. Under the administrative function, the job description states that charge nurses provide clinical supervision to nursing assistants.

[4] Only 12 pages of the nurses care manual were entered in evidence by Petitioner.

Not withstanding the job description, the evidence shows that charge nurses are, in effect, "attached" to a medicine cart. They administer medicine, perform patient assessments, fill out patient incident reports, and direct and monitor the CNAs' work to make sure that patient care is delivered properly in accordance with the Employer's standards and protocols. For example, if a combative patient is injured when handled by a CNA, the charge nurse directs the CNA not to attempt to administer care for agitated patients while the patient is so agitated. If, for another example, only one CNA is attempting to lift a patient using a mechanical hoist, the charge nurse will advise them to get another CNA to assist, as the Employer's protocol requires two employees to perform this task. Similarly, if a CNA is not getting a patient out of bed properly, the charge nurse teaches or demonstrates the proper procedure, or if a CNA is moving a patient too quickly, the charge nurse will tell the CNA to slow down. The charge nurse will also show the CNA a better technique to perform a task such as cleaning out a patient's eye. Such procedures and techniques originate from facility management and many of these procedures are included in the nursing care manuals and patient care manuals. CNAs will give similar directions to each other in how to follow the Employer's protocols.[5]

The CNAs report to the charge nurses, who are accountable for the operation of the shift. Although the DSD assigns the CNAs to care for the patients in particular rooms, there is evidence that the charge nurses may tell CNAs where to work and may assign a CNA to leave one task and do another. For example, I take further notice of the record in Case 32-RC-4776, which established that if a call light is on while the CNA assigned to a particular patient is on break, the charge nurse can assign another CNA to

[5] The record indicates that charge nurses may be disciplined for failing to ensure that CNAs complete their tasks. However, the record does not reveal any evidence that any charge nurse has ever been disciplined for a CNAs' poor performance.

leave the task he or she is performing to answer the call. Similarly, the instant record shows that if a patient does not want to be cared for by the assigned CNA, for example, if there is some conflict between the CNA and the patient, the charge nurse can assign a room trade.

In addition, when CNAs call in that they are unable to work their assigned shifts, a charge nurse is responsible for going through the Employer's established protocol to obtain additional employees. First, the charge nurse attempts to contact an on-call employee. If there are no available on-call employees, the charge nurse may seek to have an off duty CNA come in to work. The parties' collective bargaining agreement covering the CNAs and LVNs sets forth the procedures by which such employees are contacted and requires that employees be called in accordance with seniority. No employee can be required to report to work by a charge nurse. Thus, there are times when nothing further can be done by the charge nurse to obtain a CNA because there are no other CNAs to call. In these circumstances the facility operates short-staffed.

Charge nurses are required to get permission to change the CNA staffing levels. Thus, if a charge nurse believes more CNAs should be added to the shift than are set forth in the schedule, she must ask permission. There is no evidence in the record to establish whether such a belief is based on staffing ratios or an assessment of patient needs and employees' ability to complete the tasks at hand. Thus, on one occasion there was only one CNA scheduled on the floor during lunch. The RN supervisor discovered that there was a typographical error in the schedule, that two CNAs were supposed to have been scheduled, and she made a staffing adjustment. However, on another occasion, when only two CNAs were scheduled, the charge nurse believed that staffing was insufficient

and wanted three CNAs. The charge nurse contacted administrator Ruby Rakow, but was not allowed to add a third CNA. The record does not reveal any other instances of charge nurses even attempting to change the staffing levels.

Similarly, charge nurses do not have the ability to alter scheduled activities on their shifts. For example, if a charge nurse wishes to change the patient shower schedule, she must obtain permission from the DSD. Such changes cannot be unilaterally made by the charge nurse because they may impact other activities and change operational flow.

Training is provided to CNAs by the DSD who conducts regularly scheduled mandatory in-service meetings two or three times per month. The in-service meetings allow the CNAs to meet certification requirements. Unscheduled in-service meetings are also conducted by the DSD on a variety of topics. For example, if patient incident reports establish a need to review certain procedures and protocols, an unscheduled in-service meeting is held. I take further notice of the record in Case 32-RC-4776 that the DSD also performs the yearly evaluations for CNAs based on her own observations of the CNAs' job performance. The CNAs' hours are scheduled by the DSD. The DSD also determines the CNAs' room assignments, which are documented in an assignment book at the nurses station.

RN Supervisors [6]

State law requires that, seven days a week, there must be a RN who is designated as a supervisor and who is not assigned to a medication cart. Accordingly, the Employer also employs Minerva Soleta as a full-time RN day supervisor who works Monday through Friday, and Remedios Cantos who works as an on-call weekend RN nurse supervisor. DON White testified that the RN supervisor acts as an extra pair of eyes and

[6] The Employer uses the terms RN supervisor and floor supervisor interchangeably.

helping hands to assist the charge nurses. The record reflects that union-represented LVNs may also be assigned as RN supervisors during the week.[7] RN supervisors have the same authorities as charge nurses and direct CNAs in the performance of their duties. For example, they direct employees to pull bed curtains to protect patient dignity; tell employees to come back to their stations after breaks are completed; and direct them to answer call lights after patients complain that calls have not been answered. DON White further testified that the RN supervisors have the same authority as the charge nurses to assign work to CNAs

Assistant MDS Coordinator

The Employer also employs RN Debra McFarland as the Assistant Minimum Data Set (MDS) coordinator. In that capacity, she compiles computerized patient assessment data that is reported to the State of California. She reports to the MDS coordinator Kathy Potter, a stipulated supervisor. Although McFarland must go to the nurses station to collect data, she has no patient care responsibilities, does not assign duties to the CNAs, and does not have a work station on the unit. Rather, her desk is in the office next to Potter. While McFarland is an RN, the record on remand establishes that such licensure is not a job requirement for the AMDSC position. McFarland also is assigned full shifts as a charge nurse or RN supervisor when needed, once or twice every two weeks depending on whether there are staff shortages. Although working as a charge nurse or RN supervisor is not part of the job description of the AMDSC position, when McFarland works on the patient care unit, she receives the AMDSC rate of pay.

POSITIONS OF THE PARTIES

[7] The only applicable RN function that LVNs are not licensed to perform is the starting of intravenous (IV) antibiotics.

The Employer urges that the petition should be dismissed because all of the RNs employed at the facility are supervisory employees by virtue of their authority to assign and responsibly direct employees and should be excluded from the bargaining unit. In addition, the Employer contends that Nervasa is a temporary employee and that AMDSC McFarland does not share a community of interest sufficient to be included in a unit with the other RNs.

The Union contends that the Employer has failed to establish that the RNs described in the record are statutory supervisors because the record does not establish that they exercise the authority to assign and responsibly direct employees with a sufficient degree of independent judgment. With respect to McFarland, the Union contends that she should be included in the unit with the other RNs. The Union also contends that although Nervasa is designated a temporary on-call employee, her hours meet the eligibility requirements to warrant her inclusion in the unit.

ANALYSIS

The Charge Nurses and RN Supervisors

On May 29, 2001, the Supreme Court issued its decision in NLRB v. Kentucky River Community Care, 121 S.Ct. 1861 (2001). In the underlying Board case, the Board had included six registered nurses employed at a mental health care facility in the bargaining unit, finding that the employer had not met its burden of establishing that the registered nurses were supervisors within the meaning of Section 2(11) of the Act. The Court affirmed the Board's finding that the burden of proof rests with the party asserting the existence of supervisory status. However, the Court found that the Board erred in determining that the registered nurses were not statutory supervisors. In doing so the

Court rejected the Board's conclusion that the registered nurses did not exercise "independent judgment" when they exercised ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with the employer's standards.

Here, consistent with the holding of Kentucky River, and without relying on a conclusion that their judgment is merely based on their professional or technical skill and experience, I, nevertheless, again conclude that the Employer has failed to establish that the charge nurses and RN supervisors are supervisors within the meaning of Section 2(11) of the Act. It is undisputed that charge nurses and RN supervisors have the same authorities. Accordingly, the following analysis applies to both types of registered nurses, henceforth referred to collectively as nurses.

The Authority to Assign

The Employer asserts that the nurses exercise the authority to assign employees. However, in the "Assignment of Nursing Care" section of the nursing care manual, it states that the charge nurse is responsible for assigning direct resident nursing care to the nursing staff according to the unit plan (emphasis supplied). In view of this language and the apparently broad scope of the Employer's manuals and protocols, it appears that the authority and the degree of independent judgment exercised by the nurses is considerably circumscribed by the Employer's written policies, procedures, and protocols. An analysis of each type of assignment contained in the record also fails to establish that the nurses exercise independent judgment in making assignments. Thus, the responsibility of the nurses to get a CNA to replace an absent employee is performed routinely and strictly in accordance with the Employer's protocol and contractual seniority procedures. Calling

the employees set forth on a pre-set list and asking them if they would like to replace a scheduled employee is more clerical than managerial, particularly as there is no authority vested in the nurse to require any CNA to report to work. Once the nurse exhausts the list, she has no options or discretion to do anything other than accept the fact that the shift will operate short-staffed. See Harborside Healthcare, Inc., 330 NLRB No. 191, slip op. at 3 (April 24, 2000). Similarly, the Employer failed to establish that nurses can independently alter the scheduled staffing level, or effectively recommend changes in the staffing level, even when they believe that staffing is inadequate.

DON White testified broadly that nurses have the authority to assign duties to CNAs, tell CNAs where to work, and take a CNA off one task and assign him or her elsewhere. The record does not establish what factors the nurses consider in making such decisions, what protocols may apply, and what degree of independent judgment they must exercise in making these decisions. Thus, the record reflects that the nurses are authorized to assign a CNA to answer the call light of another CNA on break. This temporary substitution of one CNA for another based on availability and in furtherance of prompt care appears to be routine in nature and does not appear to require the use of independent judgment on the part of the assigning nurse. If there are circumstances under which such an assignment does require independent judgment, the Employer did not provide evidence in the record regarding those circumstances. For example, there is no evidence that the nurses weigh the abilities or experience of one CNA over another, or weigh the acuity level of the respective CNAs' patients prior to assigning one CNA to answer another CNA's call light. Absent detailed evidence of independent judgment, conclusionary statements without supporting evidence are insufficient to establish

supervisory status. See Quadres Environmental Co., 308 NLRB 101, 102 (1992) (citing Sears Roebuck & Co., 304 NLRB 193 (1991)).

Similarly, the record reflects that if a patient complains about the CNA who has been assigned to him or her in the assignment book, a nurse can assign another CNA to the patient by trading rooms. However, again the record does not establish under what circumstances the nurses are authorized to make such a trade, what factors the nurse is to consider in making such a decision, what protocols apply, and what degree of independent judgment the nurse must exercise in making these decisions. While the authority to re-assign a CNA to a different room may require some level of independent judgment, without knowing the factors that determine how and whether a trade will be made, it cannot be concluded on this record that such assignments involve the use of sufficient independent judgment to establish that the nurses who make the room trades are statutory supervisors. As the Board held in Phelps Community Medical Center, 295 NLRB 486, 490 (1989), "Whenever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least not on the basis of those indicia."

Other than the above, the record is devoid of incidents or examples of nurses exercising the authority to assign CNAs. The Employer neither called a CNA nor a nurse to testify regarding how duties are assigned or under what other circumstances nurses assign CNAs to work. Accordingly, it cannot be concluded that nurses exercise sufficient independent judgment in assigning CNAs to warrant a finding that the nurses are supervisors as defined in the Act. See The Door, 297 NLRB 601 1990 (quoting Phelps Community Medical Center, 295 NLRB 486, 490 (1989)).

The Authority Responsibly to Direct

The Employer contends that the nurses utilize independent judgment to responsibly direct the CNAs. However, the record shows that most of the directions they give are either rudimentary in nature or have their origin in the individualized patient care plan, the nurses care manual, the CNA patient care manual, or other written directions developed according to the Employer's desired standards. In Providence Hospital, 320 NLRB 717 (1996). Enfd. Sub nom. Providence Alaska Medical Center v NLRB, 121 F.3d 548 (9th Cir. 1997), the Board found that RN charge nurses with the responsibility to direct employees were not statutory supervisors because not every act of assignment or direction is made with Section 2(11) authority. The Board quoted with approval the court in NLRB v. Security Guard Service, 384 F. 2d 143, 151 (5th Cir. 1967):

> If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

Here, the instant record includes instances of nurses directing or reminding CNAs to pull a bed curtain to protect a patient's dignity, to get help when using a mechanical lift, to come back to his or her station after break; to move a patient more slowly, or to answer a call light. These directions and reminders are derived from either common sense or the Employer's applicable written protocols and require little or no application of independent judgment.

Other directions such as showing a better eye-care technique or a better technique to get patients out of bed are also based on the Employer's protocols and are more instructional than managerial. As such, CNAs give the same sorts of directions to their co-workers. Just as pointing out mistakes to employees and demonstrating correct

procedures do not establish the authority to discipline, neither do they establish, without more, the authority to responsibly direct. See e.g. Crittendon Hospital, 328 NLRB No. 120, slip op. at 5 (June 30, 1999).

The record also reflects that nurses direct CNAs to delay giving care to a patient who is combative, so as to avoid injury to themselves or the patient. Presumably this advice is also set forth in the Employer's safety manual and nursing care manual and is consistent with the Employer's obligation to safely care for its residents. The record does not indicate whether the CNAs themselves can make an assessment to delay care for a combative patient and simply report the matter to the nurse, or whether there are standing orders prohibiting CNAs from caring for combative patients. It is clear, however, that the CNAS are themselves responsible for the safe care of the patients. While there may be independent judgment utilized when a nurse determines that a particular patient is too combative to be cared for safely, this authority is derived from the nurses' responsibility to supervise the task of giving clinical care to the patient rather than the Employer's need to supervise or maintain control of its staff.[8]

[8] To the extent that the testimony of DON White shows that nurses have been instructed that they can send employees home for misconduct, such as sleeping on the job or insubordination, such evidence is really related to the supervisory indicia of discipline rather than the direction of work. Even if such evidence were considered under the indicia of directing work, the evidence indicates that this authority is derived from nothing more than the Employer's standing order, which apparently is observed only in its breach. There is no evidence that this alleged directive has ever been carried out by a nurse. Indeed, I take official notice of DON White's testimony in Case 32-RC-4776 that a CNA was discovered by a nurse to be sleeping on the job. No action was taken by the nurse other than to leave a note to DON White. Thereafter, DON White conducted a formal investigation and issued a reprimand to the CNA. Similarly, in the record in Case 32-RC-4776, there is evidence indicating that a CNA had failed to follow instructions to such a degree that the nurse believed that the CNA should be removed from the shift. The CNA was not sent home, and DON White refused to take any action against the CNA other than to instruct her to do her work. There was no indication that the nurse considered using her purported authority to send a CNA home for insubordination. Thus, even assuming that sending employees home for misconduct constitutes directing work rather than a disciplinary action, the evidence regarding the nurses' possession of this ostensible authority does not meet the threshold to establish that the nurses possess the authority to responsibly direct the CNAs. The Board has long held that supervisory authority cannot be based on alleged authority that has not in fact been exercised. See S. S. Joachim & Anne Residence, 314 NLRB 1191, 1194 (1994).

Finally, the Employer argues that the nurses must be statutory supervisors because, if they are not, there is no supervision at the Employer's facility for most of the PM shift and all of the night shift. I do not find this argument dispositive in light of the DON being on-call 24 hours a day for responding to nurses' calls regarding a wide range of patient care and personnel concerns. The fact that the staffing level for nurses is reduced by 50 percent during the night shift also indicates that patient care and other activities in the facility diminish greatly during those times to the extent that the Employer does not require on site supervision.

I find that the nurses neither assign nor responsibly direct employees with a degree of independent judgment that rises to the statutory threshold. Assignment of employees to answer a call light or handle a different patient in light of a patient complaint are routine matters that do not evince the required independent judgment to establish statutory authority. The authority to assign work alone, without the use of independent judgment, is not indicative of supervisory authority. See McGraw-Hill Broadcasting Co., Inc., 329 NLRB No. 48, slip op. at 6 (Sept. 30, 1999). Similarly, direction to help another employee, to answer a call light, or to delay care until a patient is non-combative are directions regarding the manner of the CNAs' performance of discrete tasks which they have already been directed to perform by the Employer by virtue of its comprehensive protocols and procedures as set forth its patient care plans and nursing care manuals. See Chevron Shipping Co., 317 NLRB 379, 381 (1995), cited with approval in Kentucky River.

The Board reached a similar conclusion in Dynamic Science, Inc., 334 NLRB No. 56 (2001). There, the Board reconsidered the record concerning the statutory authority of

artillery test leaders in light of the Court's holding in Kentucky River. The leaders had extensive responsibilities overseeing artillery testers. Upon reaching a site the leader and crew members were required to follow written standard operating instructions. The leaders were responsible for the safe execution of the tests; however, it was the responsibility of all the testers to follow the written instructions. The Board found that despite their responsibilities, the test leaders' role was sufficiently circumscribed by detailed orders and regulations issued by the employer and concluded that their use of independent judgment fell below the threshold required to establish Section 2(11) authority. Here, as in Dynamic Science, the Employer holds all employees responsible for following extensive, written procedures and protocols in delivering patient care.

Based on the foregoing, and the record as a whole, I find that the Employer has again failed to meet its burden of presenting sufficient evidence to establish that the nurses are statutory supervisors within the meaning of the Act. Accordingly, I shall include them in the unit herein. See Providence Hospital, 320 NLRB 7171 (1996), enfd. sub nom. Providence Alaska Medical Center v. NLRB, 121 F.3d 548 (9th Cir. 1997); see also NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 583 (1994).

Aurora Nervasa

As set forth above, the Employer contends that Aurora Nervasa should be excluded from the unit, as she is a temporary employee working in an on-call status. Nervasa was hired as a temporary charge nurse on about October 2000, and was told her position would continue until the Employer filled a full-time charge nurse position. As of the time of the original hearing, the Employer had been unable to fill that full-time position for the night shift. As of the second hearing in this case, the Employer had three

unfilled positions on the night shift, and no applications for these positions had been submitted. Nervasa has continued to work throughout this period on an on-call basis, and the Employer still does not know how long Nervasa will continue to be employed. Thus, at present, it appears that Nervasa's employment may continue for a lengthy period of time, and her tenure still remains uncertain. In these circumstances, I have concluded that she is not ineligible to vote due to the fact that she was, at least initially, hired as a temporary employee, and she will be treated as an on-call employee for purposes of determining her eligibility to vote. See St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992); Boston Medical Center Corp., 330 NLRB No. 30, slip op. at 15 (1999).

In determining whether on-call employees should be included in the bargaining unit, the Board considers whether the employees perform unit work and the regularity of their employment. Here there is no dispute that Nervasa performs unit work.. With regard to the regularity of employment issue, the Board has found that the regularity requirement can be satisfied when an employee has worked a substantial number of hours within the period of employment prior to the eligibility date. Trump Taj Mahal Casino, 294 NLRB 294, 295 (1992); Mid-Jefferson County Hospital, 259 NLRB 831 (1981). Under the Board's longstanding and most widely used test, an on-call employee is found to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee averages four or more hours of work per week for the quarter immediately prior to the eligibility date. Trump, supra, citing Davison-Paxon Co., 185 NLRB 21, 23-24 (1970).

Here, the record establishes that during the months of April 2001 through June 2001, the quarter immediately proceeding the issuance of this decision, Nervasa worked

66.4 hours, an average of 5.1 hours per week. Thus, she meets the eligibility standards for an on-call employee. Accordingly, she is included in the unit herein.

The AMDSC

It is undisputed that when McFarland works as the AMDSC, she has no patient care responsibilities, performs in a purely administrative capacity and, unlike the nurses, she works under the direction of the MDS. While she has a RN license in common with the other nurses, the record is clear that the Employer does not require the person working as the AMDSC to have an RN license. As such, I find that McFarland does not share a community of interest with the other registered nurses simply by virtue of her license. See Ralph Davies Medical Center, 256 NLRB 1113 (1981).

However, McFarland also works as a substitute for charge nurses and RN supervisors in the patient care unit, when no one else is available to fill those positions. The record reflects that she does so once or twice every two weeks, or 10 to 20 percent of her time. I find that McFarland is essentially a dual-function employee. The Board has long held that dual-function employees may be included in the unit if they perform duties similar to unit employees to a sufficient degree and with sufficient regularity to demonstrate that they have a substantial interest in the unit's wages, hours, and working conditions. See Berea Publishing Company, 140 NLRB 516 (1963). Here, I find that McFarland's performance of unit work only 10 to 20 percent of the time does not establish a sufficient community of interest to be included in the unit. Accordingly, I shall exclude McFarland from the unit herein. See Wilson Engraving Company, 252 NLRB 333 (1980) (15 to 20 percent of time spent in unit insufficient to establish a

community of interest); Martin Enterprises, Inc., 325 NLRB 714 (1998) (10 percent of time spent in unit insufficient to establish community of interest).

Petitioner is currently recognized by the Employer in a bargaining unit consisting of all full-time and regular part-time licensed vocational nurses, nurses aides, certified nursing assistants, dietary employees including cooks, housekeepers, maintenance employees, laundry employees, activity assistants, and janitors employed by the Employer at its facility located at 2586 Buthmann Avenue, Tracy, California; excluding professional employees, technical employees, business office clerical employees, dietary/supervisor cooks, guards and supervisors as defined by the Act.[9]

Petitioner seeks by means of an *Armour-Globe*[10] self determination election to add to this unit a residual unit consisting of non-management registered nurses (RNs), subject to the majority of the votes being cast in favor of Petitioner.

Accordingly, I shall direct a self-determination election among the following employees:

> **All full-time and regular part-time registered nurses (RNs) employed by the Employer at its Tracy, California facility; but excluding the director of nursing (DON), director of staff development (DSD), medical data set coordinator (MDS), assistant medical data set**

[9] On July 31, 2000, I issued a Decision and Direction of Election in Case 32-RC-4776, which involved the same parties as the instant case, wherein I found that the classification of licensed vocational nurses serving as charge nurses at the Employer's facility is not one that is supervisory under the Act. On August 23, 2000, the Employer's request for review of my Decision was denied by the Board, and on August 29, 2000, a majority of the LVNs voted to be included in the preexisting unit.

[10] See, Globe Machine & Stamping Co., 3 NLRB 294 (1937); Armour & Co., 40 NLRB 1333 (1942); see also Ten Broeck Commons, 320 NLRB 806, 814 (1996) (Board ordered a self-determination election to include licensed practical nurses (LPNs) in an existing service and maintenance unit, while noting that whether a separate technical unit of LPNs is appropriate in a non-acute care facility such as a nursing home is an issue decided on the facts of each case requiring additional litigation.)

coordinator (AMDSC), all other employees, guards, other professional employees, and supervisors as defined by the Act.

If a majority of ballots are cast for the Petitioner, they will be taken to have indicated the employees' desire to be included in the existing unit of all full-time and regular part-time licensed vocational nurses, nurses aides, certified nursing assistants, dietary employees including cooks, housekeepers, maintenance employees, laundry employees, activity assistants, and janitors employed at the Tracy, California facility; excluding professional employees, (other than registered nurses), technical employees, business office clerical employees, dietary/supervisor cooks, guards and supervisors as defined in the Act. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented. In any event, an appropriate certification will issue.

There are approximately eight (8) employees in the voting group.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.[11] Eligible to vote are those in the voting group who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as

[11] Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

such during the eligibility period and their replacements. Those in the military service of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by Local 250, Health Care Workers Union, Service Employees International Union (SEIU), AFL-CIO, CLC.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v Wyman-Gordon Co., 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before August 17, 2001. No extension of time to file this list shall be granted except in

extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570.

This request for review must be received by the Board in Washington, D.C. by August 24, 2001.

Dated at Oakland California this 10th day of August, 2001.

James S. Scott, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

32-1228

Digest Numbers:
177-8520-0800-0000
177-8520-1600-0000
177-8520-2400-0000
177-8520-3900-0000
177-8520-9200-0000
177-8560-1500-0000
177-8580-8050-0000
460-5067-7050
460-5067-8200
470-1733-0100

Evergreen New Hope Health & Rehabilitation Center *and* Local 250, Health Care Workers Union, Service Employees International Union (SEIU), AFL–CIO, CLC. Case 32–CA–19189–1

May 8, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

This is a refusal-to-bargain case in which the Respondent seeks to contest the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on October 18, 2001, the General Counsel of the National Labor Relations Board issued a complaint and an amended complaint on November 16, 2001, and January 4, 2002, respectively (together, the amended complaint), alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to provide information following the Union's certification in Case 32–RC–4872–2. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982)). The Respondent filed an answer and an amended answer (together, the amended answer), admitting in part and denying in part the allegations in the amended complaint.

On January 24, 2002, the General Counsel filed a Motion for Summary Judgment. On February 5, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its contention, raised and rejected in the representation proceeding, that the unit improperly includes its registered nurses, whom the Respondent maintains are statutory supervisors. The Respondent also admits its refusal to provide the information requested by the Union, but, relying on its claim that the Union was not properly certified, denies that it had any legal obligation to do so. The Respondent in any event denies that the requested information is relevant and necessary to the Union's role as bargaining representative.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).[1]

We also find that there are no genuine issues of material fact warranting a hearing on the Union's request to bargain or its request for information. By letter dated October 26, 2001, the Union issued to the Respondent a "formal demand to bargain regarding the RNs" and advised that this was a "continuing demand." In the same letter, the Union requested the Respondent to provide the following information:

(1) Names, addresses and telephone numbers for all currently employed RNs in the bargaining unit;
(2). Dates of hire and current wage rates for all RNs in the bargaining unit;
(3) All benefits currently offered to the RNs;
(4) The number of paid holidays the RNs currently have;
(5) Any and all materials given to RNs during orientation; and;
(6) Any and all employment policies at New Hope that may affect the RNs.

In a followup letter dated January 4, 2002, the Union repeated its demand that the Respondent "recognize the Union, comply with the Union's request for information, and meet and bargain in good faith as soon as reasonably possible" for an agreement covering the certified unit.[2]

[1] By unpublished Order dated June 20, 2001, the Board, in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), granted the Respondent's request for review of the Regional Director's Decision and Direction of Election with respect to the supervisory status of its registered nurses. The Board remanded the proceeding to the Regional Director to reopen the record on the issues of whether the registered nurses "assign" or "responsibly direct" other employees and the scope and degree of "independent judgment" used in the exercise of such authority. Following a hearing on remand, the Regional Director issued a Supplemental Decision and Direction of Election in which he, applying *Kentucky River*, reaffirmed his finding that the Respondent had failed to establish that its registered nurses were statutory supervisors. On September 21, 2001, the Board denied the Respondent's request for review of this supplemental decision.

[2] The Respondent denies in its amended answer that the Union's October 26, 2001 letter requested it to bargain. The General Counsel, however, has submitted with his motion copies of this letter evidencing the Union's request. The Respondent has not disputed the authenticity of that correspondence, or asserted any argument whatsoever in support of its denial. In any event, the Respondent does not deny that the Union again demanded bargaining in its January 4 letter. Accordingly, we find that the Respondent's denial does not raise any issue warranting a hearing.

tion, and since about the same dates the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after October 26, 2001, and January 4, 2002, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Evergreen New Hope Health & Rehabilitation Center, Tracy, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 250, Health Care Workers Union, Service Employees International Union (SEIU), AFL–CIO, CLC, as the exclusive bargaining representative of the employees in the bargaining unit, including the voting group.

(b) Refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time registered nurses (RNs), licensed vocational nurses, nurses aides, certified nursing assistants, dietary employees (including cooks), housekeepers, maintenance employees, laundry employees, activity assistants, and janitors employed by Respondent at its Tracy, California facility; excluding the director of nursing (DON), director of staff development (DSD), medical data set coordinator (MDS), assistant data set coordinator (AMDSC), all other professional employees (other than registered nurses), technical employees, business office clerical employees, dietary supervisor cooks, guards, and supervisors as defined in the Act.

Furnish the Union the information that it requested on October 26, 2001, and January 4, 2002.

(c) Within 14 days after service by the Region, post at its facility in Tracy, California, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 26, 2001.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 8, 2002

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] The General Counsel has requested a remedy under *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). We find that such a remedy would be inappropriate in this case. See *Edward J. DeBartolo Corp.*, 315 NLRB 1170, 1171 fn. 3 (1994).

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

CERTIFICATE OF SERVICE

I, Daniel M. Kovalik, do hereby certify that a true and correct copy of the foregoing Union's Brief Upon Review was served via U.S. mail, postage prepaid, on this 14th day of November, 2002, on the following:

Ronald M. Sharp
Regional Director
Region 18
National Labor Relations Board
Towle Building, Suite 790
330 Second Avenue, South
Minneapolis, MN 55401

Penelope J. Phillips, Esq.
Thomas R. Trachsel, Esq.
Felhaber, Larson, Fenlon & Vogt, P.A.
225 South Sixth Street
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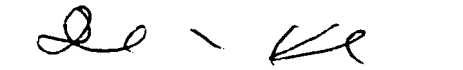
Minneapolis, MN 55402



Daniel M. Kovalik